Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 11871 of 2015 - DB

(Arising out of OIA-SIL-EXCUS-000-COM-035-14-15 dated 28/05/2015 passed by Commissioner of Central Excise, Customs and Service Tax-SILVASA)

Faze Three Limited **.....Appellant**
S No. 380/1, Dapada, Silvassa-khanvel Road,
SILVASSA
DADRA & NAGAR HAVELI

VERSUS

C.C.E & S.T.-Silvasa **.....Respondent**
Commissioner Central Excise,
Customs & Service Tax, Silvassa,
4th floor, Adarsh Dham Building,
Vapi Daman Road Vapi
Opp. Old Town Police Station
VAPI, Gujarat

WITH

EXCISE Appeal No. 12040 of 2015 - DB

(Arising out of OIO-SIL-EXCUS-000-COM-037-14-15 dated 12/06/2015 passed by Commissioner of Central Excise, Customs and Service Tax-SILVASA)

Rashmi Anand **.....Appellant**
Director, Faze Three Limited.,
S No. 380/1, Dapada,
Silvassa-khanvel Road,
Silvassa, Dadra & Nagar Haveli

VERSUS

C.C.E & S.T.-Silvasa **.....Respondent**
Commissioner Central Excise,
Customs & Service Tax, Silvassa,
4th floor, Adarsh Dham Building,
Vapi Daman Road Vapi
Opp. Old Town Police Station
VAPI, Gujarat

AND

EXCISE Appeal No. 12041 of 2015 - DB

(Arising out of OIO-SIL-EXCUS-000-COM-037-14-15 dated 12/06/2015 passed by Commissioner of Central Excise, Customs and Service Tax-SILVASA)

S P Kalsi **.....Appellant**
Senior Vice President, Faze Three Limited.,
S No. 380/1, Dapada, Silvassa-khanvel Road,
Silvassa, Dadra & Nagar Haveli

VERSUS

C.C.E & S.T.-Silvasa **.....Respondent**
Commissioner Central Excise,
Customs & Service Tax, Silvassa,
4th floor, Adarsh Dham Building,
Vapi Daman Road Vapi
Opp. Old Town Police Station
VAPI, Gujarat

APPEARANCE:
Shri Prakash Shah, Shri Mihir Mehta & Shri, Mohit Rawal, Advocate for the Appellant
Shri Ashok Thanvi, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10138-10140/2024

DATE OF HEARING: 06.09.2023
DATE OF DECISION: 12.01.2024

RAMESH NAIR

The brief facts of the case are that on the basis of the investigation and recording of the statements of the employees of the appellant, a show cause notice dated 19.12.2013 was issued to the Appellant inter-alia demanding an amount of Rs. 1,40,23,501 being 10% of the clearance value of exempted product under Rule 6 (3) of CCR and Rs. 40,66,510/- pertaining to credit availed on capital goods allegedly used exclusively in manufacture of exempted product and lying in balance as on 07.12.2008 along with interest and penalties. The said notice also proposed to impose personal penalty on other two appellants under Rule 26 of Central Excise Rules,2002.

1.2 The Adjudicating Authority vide order-in-original dated 24.06.2015 ordered as under :-

> *"(i)Ordered to lapse the credit of Rs. 1,20,80,589/- lying in the balance as on 07.12.2008 under the Section 11 A (2) and 11 A (10) of the Credit Rules.*
>
> *(ii) An amount of Rs. 48,663/- (being 10% of the local clearance of the exempted product) under Rule 6 (3) of CCR attributable to the local clearance;*
>
> *(iii) confirmed the demand of Rs. 40,66,510/- towards balance of credit pertaining to capital goods lying as on 07.12.2008. However, since the said amount was included in the amount of Sr. No. (i) above the same was not demanded again.*

The respondent also imposed penalty of Rs. 20,00,000/- on Mr. S.P Kalsi and Rs. 25,00,000/- on Ms. Rashmi Anand under Rule 26 of CER.

1.3 The one relevant fact is also that earlier a show cause notice dated 29.08.2013 was issued to the appellant demanding cenvat credit of Rs.35,82,694/- attributable to inputs and input services used in manufacture of exempted product along with interest and penalty. After remand by the Tribunal the Adjudicating Authority confirmed the demand of Rs. 9,48,034 along with interest and equal penalty which the appellant has accepted and proceeding related to the cenvat credit attributable to the exempted goods was concluded.

2. Shri Prakash Shah, Learned Counsel with Shri Mihir Mehta and Shri Mohit Raval, Learned Advocates appearing on behalf of the appellant submits that the show cause notice proposed to demand an amount of Rs. 1,40,23,501/- being 10% of the value of the cleared exempted goods under Rule 6 (3) Cenvat Credit Rules, 2004 whereas the Adjudicating Authority has gone altogether on different ground and ordered the lapse of credit of Rs. 1, 20,80,589/- lying in balance as on 07.12.2008. It is his submission that it is a completely different issue which was not raised in the show cause notice, therefore, order which is traveled beyond the show cause notice, irrespective of any fact and legal issue, will not sustain on this ground alone.

2.1 As regard the demand of Rs. 40,66,510/- the balance of credit pertaining to capital goods as on 07.12.2008, it is his submission that this demand was raised on the ground that capital goods was used exclusively in manufacture of exempted final product. He submits that the capital goods were received by the appellant much before the final product became exempted and during the receipt till the final product became exempted, the capital goods were being used for manufacture of dutiable

goods. Therefore, the allegation in this regard is absolutely without any basis and beyond the fact that the capital goods were used for both dutiable as well as exempted goods and not used exclusively for exempted goods.

2.2 Without prejudice, he further submits that even though the order is for lapsing of credit, but it is also not tenable for the reason that as per Rule 11 (3) of Cenvat Credit Rules, after reversal of the credit on input, input in process or input contained in the final product whatever the balance remains, the same shall lapse only when the assessee avail unconditional notification, whereas in the present case exemption is based on the condition, therefore, lapsing provision shall not apply on the fact of the present case.

2.3 He also submits that even though so called exempted goods have been exported partly and to that extent the cenvat credit cannot be denied. He further submits that as regard the main allegation in the show cause notice that since the appellant had availed the cenvat credit on the common input service attributed to the exempted goods, the same will not sustain for the reason that as per the proceeding of earlier show cause notice dated 29.08.2013, the case stand concluded and according to which whatever cenvat credit attributable to the exempted goods stand paid along with interest and also paid 25% penalty. As per this admitted position in the present case, there is no case of availment of cenvat credit on the common input services attributable to the exempted goods, therefore, the entire basis of this show cause notice dated 19.12.2013 does not exists and without any foundation for this reason also even the demand on the basis of the allegation made in the show cause notice also does not sustain. He placed reliance on the following judgments:-

- Commissioner of C.Ex., Nagpur vs. Ballarpur Industries Ltd – 2007 (215) ELT 489 (SC)
- Caprihans India Ltd vs. CCE – 2015 (325) ELT 632 (SC)
- Commissioner of Customs, Mumbai vs. Toyo Engineering India Ltd – 2006 (201) ELT 513 (SC)
- Swapne Nagari Holiday Resort vs. Commissioner of C.Ex., Raigad – 2019 (21) GSTL 559 (Tri.- Mumbai)
- Senor Metals Pvt Limited vs. Commissioner of Central Excise & ST, Rajkot – 2023 (7) TMI 1115 – CESTAT Ahmedabad
- Shri Baba Exports vs. CCE, Meerut-II – 2015 (318) ELT 328 (Tri.Del)
- John Deere India Pvt Ltd vs. CCE, Pune-III – 2015 (326) ELT 205 (Tri. -Mumbai)
- Amrit Foods vs. Commissioner of Central Excise, U.P- 2005 (190) ELT 433 (SC)
- Commissioner of Central Excise, Madurai vs. Fenner (India) Ltd – 2014 (313) ELT 3 (Mad.)
- Metro Enterprises vs. Commissioner of C. Ex. Thane-II, - 2014 (311) ELT 785 (Tri.- Mumbai).

3. On the other hand, Shri Ashok Thanvi, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the issue in the present appeal to be addressed by this bench are as under:-

(i) Whether the fact that the show cause notice proposed the demand of 10% under Rule (3) of Cenvat Credit Rules and the order confirming the

demand under Rule 11(3) of Cenvat Credit Rules, 2004 is beyond the charges made in the show cause notice and whether on that ground demand is sustainable or otherwise.

(ii) Whether the demand of 10% under Rule 6 (3) of Cenvat Credit Rules in the fact that the entire credit attributed to the common input services used in the exempted goods has been reversed, is correct or otherwise.

(iii) Whether the demand of cenvat credit in respect of balance credit lying as on 07.12.2008 under Rule 11(3) of Cenvat Credit Rules, 2004 being lapsed is recoverable or otherwise.

(iv) Whether the appellant is liable to reverse the cenvat credit on capital goods when the final product manufactured by use of such capital goods became exempted subsequently.

4.1 As regard the first issue, we find that it is an admitted fact that the show cause notice has demanded 10% under Rule 6(3) of Cenvat Credit Rules on the ground that appellant has availed cenvat credit on common input service which were used in the exempted and dutiable final product. However, in the adjudication order the demand of Rs, 1,20,80,589/- was confirmed on the ground that the said amount was lying in the balance as on 07.12.2008 when the appellant have opted for the exemption and according to Rule 11 (3) of Cenvat Credit Rules, 2004, as the said amount has lapsed. Thus the adjudication order has clearly travelled beyond the scope of show cause notice. It is a settled law in various judgments that when with regard to any charge/allegation the noticee is not put to notice that issue cannot be decided in the adjudication order. This view is supported by the various judgments cited by the appellant which are as under: -

- Commissioner of C.Ex., Nagpur vs. Ballarpur Industries Ltd – 2007 (215) ELT 489 (SC)
- Caprihans India Ltd vs. CCE – 2015 (325) ELT 632 (SC)
- Commissioner of Customs, Mumbai vs. Toyo Engineering India Ltd – 2006 (201) ELT 513 (SC)
- Swapne Nagari Holiday Resort vs. Commissioner of C.Ex., Raigad – 2019 (21) GSTL 559 (Tri.- Mumbai)
- Senor Metals Pvt Limited vs. Commissioner of Central Excise & ST, Rajkot – 2023 (7) TMI 1115 – CESTAT Ahmedabad

4.2 In view of the above judgments, it is a settled law that then adjudication order cannot travel beyond the scope of show cause notice, therefore, we hold that the demand is not sustainable on the ground that the adjudication order is beyond the scope of show cause notice.

4.3 As regard the second issue, without prejudice to the above, we find that the demand of 10% of value of exempted goods wherein the common cenvatable input services were used in the exempted as well as dutiable goods. In the present case, earlier a show cause notice dated 29.08.2013 was issued wherein the cenvat credit of Rs. 35,82,694 attributed to input and input services used in the exempted product was proposed. This matter traveled upto Tribunal and Tribunal vide Final Order No. A/13361-13362/2017 dated 25.10.2017 remanded the matter back to the Adjudicating Authority. In the said remand vide Order-In-Original No. DMN-EXCUS-000-COM-032-18-19 dated 29.01.2019 confirmed the demand of Rs. 9,48,034/- and dropped the balance demand amounting to Rs. 26,34,659. Since the appellant had already reversed the amount final confirmed of Rs. 9,48,034/-, accordingly, the entire cenvat credit attributed to the input and input services used in exempted goods was reversed and

the same attained finality. Therefore, the entire basis for demanding 10% of the value of exempted goods under Rule 6 (3) (b) does not exist. Accordingly, the demand of 10% of the value of exempted goods which was proposed in the show cause notice is also not sustainable.

4.4 As regard the third issue that whether the demand of balance cenvat credit of Rs. 1,20,80,589/- which was lying as on 07.12.2008 can be demanded being lapsed under Rule 11 (3) Cenvat Credit Rules, 2004, we find that the provision for lapsing of balance credit as on the date when the assessee opt for exemption is not applicable when the assessee manufacture and clear dutiable as well as exempted goods. In the present case there is no dispute that the appellant was manufacturing dutiable goods viz. other than 100% cotton as well as exempted final product (articles of 100% cotton) hence, the credit balance available as on 07.12.2008 was available for utilization for payment of duty on dutiable products. This issue is settled in the following judgments: -

- Shri Baba Exports vs. CCE, Meerut-II – 2015 (318) ELT 328 (Tri.Del):-

> *"7.1 From a perusal of this sub-rule, it is clear that this sub-rule would be applicable if the some Cenvat credit availed inputs are being used for manufacture of a final product and that final product has become fully exempt from duty. In such a situation, the assessee would be liable to pay an amount equal to the Cenvat credit involved in respect of the inputs lying in stock or in process, or contained in the final products lying in stock on the date of exemption, and after deducting this amount from the Cenvat credit balance, if any, as on the date of exemption, if any Cenvat credit balance still remains, it shall lapse and the same shall not be allowed to be utilized for payment of duty on any goods whether cleared for home consumption or for export. In our view, this sub-rule would not apply when out of common Cenvat credit availed inputs, more than one final products are manufactured and while some final products have become exempt, others have remained dutiable. Since in terms of sub-rule (4) of Rule 3 of the Rules, the Cenvat credit may be utilized for payment of any duty of excise on any final product, if out of the same Cenvat credit availed inputs, more than one*

final product are manufactured and out of those final products, one final product has become fully exempt from duty, the Cenvat credit can be utilized for payment of duty on the other final products, which are dutiable and as such, the manufacturer's right to utilize the Cenvat credit for payment of duty on the final products which are still dutiable cannot be taken away just because out of several final products, one final product has become exempt from duty. We, therefore, hold that the Revenue's interpretation of Rule 11(3) is not correct."

- John Deere India Pvt Ltd vs. CCE, Pune-III – 2015 (326) ELT 205 (Tri. - Mumbai):-

6.2 We find from the impugned order that the adjudicating authority has not disputed the fact that the appellant utilized the carried forward Cenvat credit towards discharge of their duty liability in respect of goods i.e. aggregates, components and parts of tractors. This undisputed facts would mean that the appellant herein was not manufacturing only exempted agricultural tractors but was also manufacturing other products on which duty liability arises. On the background of such factual matrix, we have to consider the provisions of sub-rule 3 of Rule 11 which reads as under : -

"Sub-rule (3) of Rule 11 :

"(3) manufacturer or producer of a final product shall be required to pay an amount equivalent to the Cenvat credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, -

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under Section 5A of the Act; or

(ii) the said final product has been exempted absolutely under Section 5A of the Act, and after deducting the said amount from the balance of Cenvat credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of Service Tax on any output service, whether provided in India or exported."

6.3 It can be seen from bare perusal of the said sub-rule the same will apply only in a situation where final products are exempted and lying in stock. In our considered view

the above sub-rule may not be applicable in the facts of this case which is not disputed that there is a discharge of Central Excise duty liability on the other finished products manufactured and cleared like aggregates, components & parts of tractors. The above said view is fortified by the judgment of the Tribunal in the case of Shree Baba (supra) wherein after extracting sub-rule 3 of Rule 11 of the Cenvat Credit Rules, the Bench recorded as under :-

> *"7.1 From a perusal of this sub-rule, it is clear that this sub-rule would be applicable if the some Cenvat credit availed inputs are being used for manufacture of a final product and that final product has become fully exempt from duty. In such a situation, the assessee would be liable to pay an amount equal to the Cenvat credit involved in respect of the inputs lying in stock or in process, or contained in the final products lying in stock on the date of exemption, and after deducting this amount from the Cenvat credit balance, if any, as on the date of exemption, if any Cenvat credit balance still remains, it shall lapse and the same shall not be allowed to be utilized for payment of duty on any goods whether cleared for home consumption or for export. In our view, this sub-rule would not apply when out of common Cenvat credit availed inputs, more than one final products are manufactured and while some final products have become exempt, others have remained dutiable. Since in terms of sub-rule (4) of Rule 3 of the Rules, the Cenvat credit may be utilized for payment of any duty of excise on any final product, if out of the same Cenvat credit availed inputs, more than one final product are manufactured and out of those final products, one final product has become fully exempt from duty, the Cenvat credit can be utilized for payment of duty on the other final products, which are dutiable and as such, the manufacturer's right to utilize the Cenvat credit for payment of duty on the final products which are still dutiable cannot be taken away just because out of several final products, one final product has become exempt from duty. We, therefore, hold that the Revenue's interpretation of Rule 11(3) is not correct."*

6.4 In our view, the ratio as reproduced above would be squarely applicable in the case in hand. Reliance placed by the learned DR in the case of Bajaj Foods Ltd. (supra) will not carry the Revenue's case any further inasmuch the said Bajaj Foods Ltd. case, the factual findings are that the goods manufactured by the appellant therein when he converted to DTA were fully exempted from payment of duty and the reliance placed on the decision of Jt. Secretary, Department of Revenue in the case of Technocraft

Industries (India) Ltd. (supra) also may not be applicable as in that case the issue was not the applicability of sub-rule (3) of Rule 11 of Cenvat Credit Rules."

4.5 In view of the above the appellant is not liable to reverse or pay back credit balance lying as on 07.12.2008. Hence, the demand on this count is also not sustainable.

4.6 As regard fourth issue, we find that as per the admitted fact, before the final product became exempted, on the same capital goods the same exempted product was earlier manufactured when it was dutiable therefore, the capital goods were not used by the appellant exclusively for manufacture of exempted final product. The appellant cleared the goods under Notification No. 29/2004 before it got exempted and it was subject to duty at the rate of 4%. Therefore, the capital goods were not used exclusively for the manufacture of exempted of final product. Hence, the allegation of the show cause notice that the capital goods were used exclusively for manufacture of exempted final product is not correct. Therefore, the demand on this count is also not sustainable. This issue has been considered by this Tribunal in the following judgments: -

- In the case of Bannari Amman Spinning Mills Ltd- 2022 (2) TMI 57-CESTAT Chennai Has passed following order:

"20.1 Another allegation raised by the department is that capital goods have been used exclusively for the manufacture of exempted goods. In the present case, the appellants were paying duty @ 4% on the goods manufactured by using the very same capital goods. There is no room for doubt that the capital goods were not exclusively used for manufacture of exempted goods. The Tribunal in the case, of S.T.Cotton Exports (P) Ltd. Vs CCE Ludhiana (supra) had occasion to analyse this issue in regard to Notification No.30/2004-CE and Notification No.29/2004-CE. The relevant portion of the judgement reads as under :

*"**4**. I have carefully considered the submissions from both sides and perused the records. Capital goods, in question, had been received during January, 2005 to March, 2005 and at that time the goods manufactured by using those capital goods - cotton yarn had been cleared by a duty exemption under Notification No. 30/2004-C.E. However, from June, 2005 onward the appellants started availing benefit of Notification No. 29/04-C.E. in respect of their clearances for export where there is optional rate of duty of 4% and there is no dispute about the fact that Notification No. 29/04-C.E. and 30/04-C.E. were being availed during the same period simultaneously. In view of this position, it cannot be said that the capital goods in question had been used exclusively for the manufacture of fully exempted finished products. Under sub-rule (4) of Rule 6 of Cenvat Credit Rules, 2004, capital goods Cenvat credit is inadmissible only in respect of those capital goods which are exclusively used in the manufacture of exempted goods. But it is not so in this case. In the case of Surya Roshni Ltd. (supra) relied upon by the Commissioner (Appeals), the finished products at the time of receipt of capital goods were fully and unconditionally exempt from duty while it is not so in this case as in this case while Notification No. 30/04-C.E. provides full duty exemption subject to the condition that no input duty credit has been taken, Notification No. 29/04-C.E. issued on the same date provides optional rate of duty of 4% adv. without any condition. Therefore, the ratio of Tribunal's judgment in the case of Surya Roshni Ltd. (supra) is not applicable to the facts of this case. In view of the above discussion, impugned order is not sustainable and the same is set aside. Appeal is allowed."*

21. The said decision was upheld by the Hon'ble High Court of Punjab & Haryana cited supra. From the above, we see that issues that pose for our consideration in these appeals have been decided and settled by decisions discussed above. Though it is alleged in the show cause notice that the appellants have availed credit on input services, the Ld. Counsel for appellants has asserted that the issue is with regard to disallowance of credit on capital goods only.

22. After appreciation of facts and evidence placed before us and applying the decisions cited supra, we are of the considered opinion that the disallowance of credit cannot be justified. Impugned orders are set aside. Appeals are allowed with consequential relief."

- In the case of Nahar Industrial Enterprise Ltd –2021 (8) TMI 799-CESTAT Chandigarh has passed the following order:-

"18. Further, we take a note of the fact that on similar facts for the subsequent period, the cenvat credit on capital goods was allowed by the adjudicating authority to the appellant in their own case. Therefore, the revenue cannot take divergent view on the same issue which has already been settled by this Tribunal. As Rule 6 (4) of CCR, 2004 deals with the situation that if the capital goods have been used for manufacture of exclusively exempted goods, cenvat credit is not available. But, as per the facts of the case and arguments advanced by the Learned Counsel for the appellant, the appellant is manufacturing dutiable as well as exempted goods and clearing part of the goods on payment of duty, in those circumstances, the provision of Rule 6(4) of CCR, 2004 are not applicable to the facts of the case.

19. Further, it is not a case of the Revenue that the appellant is not entitled for the benefit of the Notification No. 29/2004-CE dated 09.07.2004, 30/2004-CE dated 09.07.2004, 59/2008-CE dated 07.12.2008 and Notification No. 58/2008-CE dated 07.12.2008.

20. In those circumstances, we hold that the cenvat credit on capital goods during the impugned period cannot be denied to the appellant. Further, even if it is agreed that notification no. 29/2004-CE read with Notification No. 58/2004-CE was considered which provided full, unconditional exemption notification up to 6.7.2009, capital goods credit would not have been available during that period. Once the duty became payable from 7.7.2009, the appellant was entitled to take credit on the capital goods used in the manufacture of the goods. No time limit has been prescribed for availing CENVAT credit on capital goods. As long as the capital goods in question were used in the manufacture of dutiable goods (post 7.7.2009), nothing stops the appellant from taking CENVAT credit even on the capital goods received earlier (up to 6.6.2009) but also used post 7.7.2009.

21. In these terms, we do not find any merit in the impugned order, the same is set-aside.

22. In result, the appeal is allowed with consequential relief, if any."

5. In view of the above, the demands proposed in the show cause notice is not sustainable on multiple counts as discussed above. Accordingly, the impugned order is set aside. Appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 12.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha